

**AFTER RECORDING RETURN TO:**

Katherine F. Weber  
Inslee, Best, Doezie & Ryder  
Rainier Plaza, Suite 1900  
777 108th Avenue N.E.  
P.O. Box C-90016  
Bellevue, WA 98009-9016



PACIFIC NW TITLE

NOTICE \$61.00

200412170365

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Kitsap Co, WA

**EXCISE TAX EXEMPT** DEC 17 2004

*PWT 320 80995*

**NOTICE OF AGREEMENT AND COVENANTS AFFECTING REAL PROPERTY**

Grantor(s): City of Bainbridge Island, Washington, a municipal corporation  
Grantee(s): United States of America, for the benefit of the Environmental Protection Agency  
Short Legal Description: Portions of Government Lots 3 and 4, Section 35, Township 25 North, Range 2 East, W.M., Kitsap County, Washington  
Assessor's Property Tax Parcel/Account Number(s): 352502-1-2001 - 2001  
Reference Number(s) of Documents Assigned or Released:

NOTICE is hereby given that the CITY OF BAINBRIDGE ISLAND, WASHINGTON, a municipal corporation ("Grantor") has entered into an Agreement and Covenant Not to Sue (the "PPA") with the UNITED STATES OF AMERICA, for the benefit of the Environmental Protection Agency (the "Grantee").

Said PPA contains covenants and conditions affecting that real property legally described as follows:

Resultant Parcel A of Boundary Line Adjustment recorded under Auditor's File No. 200411240195, being a portion of Government Lots 3 and 4, Section 35, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, lying Westerly of the following described line:

Beginning at the West quarter corner of said Section 35;  
Thence along the East-West centerline of said Section 35, South 88°57'00" East 2636.39 feet to the center of said Section 35;

STATE OF WASHINGTON }  
COUNTY OF KITSAP } SS  
THIS IS TO CERTIFY that the document to which this certificate is affixed, is a true and correct copy as the same appears on record in the office of the Kitsap County Auditor.  
WITNESS my hand and Official Seal this 14 day of JAN 20 05

KAREN A. YNN Kitsap County Auditor  
BY: *[Signature]*  
Deputy

Thence along the North line of the plat of Eagle Harbor Acre Tracts as recorded in volume 2, page 80 of plats, records of said Kitsap County, South 89°01'49" East 1000.00 feet to the True Point of Beginning;

Thence leaving said North line, North 01°39'59" East 288.38 feet to the Northerly right of way of NE Eagle Harbor Drive;

Thence Easterly along said right of way on a 1462.39 foot radius curve to the right the center of which bears South 02°39'18" West through a central angle of 05°33'28", an arc distance of 141.86 feet;

Thence continuing along said right of way, South 81°47'14" East 299.49 feet;

Thence leaving said right of way, North 30°28'39" East 567.00 feet to the West face of the South end of a steel sheet pile bulkhead;

Thence along said West face and its Northerly extension North 02°17'00" East to the Northerly limits of said Government Lot 4 and the terminus.

EXCEPT Taylor Avenue NE.

EXCEPT NE Eagle Harbor Drive

TOGETHER with Second Class Tidelands to the line of extreme low tide as conveyed by the State of Washington, situate in front of, adjacent to and abutting thereon; EXCEPT any portion of said tidelands lying Westerly of the boundary line described in the instrument recorded under Kitsap County Auditor's File No. 8208020105; And TOGETHER with any portion of said tidelands lying Easterly of the boundary line described in the instrument recorded under Auditor's File No. 8208020105.

Subject to and Together with easements, restrictions, and reservations of record.

(the "Property"). The PPA is attached hereto as Exhibit A and is incorporated by this reference. Exhibit 1 to the PPA has been intentionally omitted, as it does not contain any covenants or restrictions intended to run with the land.

DATED this 16 day of December, 2004.

**GRANTOR:**

City of Bainbridge Island, Washington, a  
municipal corporation



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By *Darlene Kordonowicz*  
Its: Mayor

STATE OF WASHINGTON     )  
                                      ) ss  
COUNTY OF KITSAP        )

I certify that I know or have satisfactory evidence that Darlene Kordonowicz is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument, and acknowledged it as the Mayor of City of Bainbridge Island, Washington to be the free and voluntary act of such entity for the uses and purposes mentioned in the instrument.

DATED: December 16, 2004

*Susan D. Unger*

NAME: SUSAN D. UNGER  
(Print Name)

Notary Public in and for the State of Washington.

Commission Expires: 2/29/08



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EXHIBIT "A"

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

IN THE MATTER OF:  
The former Wyckoff/PSR Facility  
Bainbridge Island, Washington, a portion  
of the Wyckoff/Eagle Harbor Superfund  
Site

EPA DOCKET NO. 10-2003-XXXX

UNDER THE AUTHORITY OF THE  
COMPREHENSIVE ENVIRONMENTAL  
RESPONSE, COMPENSATION, AND  
LIABILITY ACT OF 1980, 42 U.S.C.  
§ 9601, ET SEQ., AS AMENDED.

AGREEMENT AND COVENANT  
NOT TO SUE CITY OF  
BAINBRIDGE ISLAND

Wyckoff/PSR-Bainbridge Island Prospective Purchases Agreement - Page 1



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1 I. INTRODUCTION

2 This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and  
3 between the United States on behalf of the Environmental Protection Agency ("EPA") and the City  
4 of Bainbridge Island ("City" or "Settling Respondent"). This Agreement is entered into pursuant to  
5 the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended  
6 ("CERCLA"), 42 U.S.C. §9601, et seq., and the authority of the Attorney General of the United  
7 States to compromise and settle claims of the United States.

8 The Trust For Public Land ("TPL"), working as a facilitator with the buyer and seller,  
9 negotiated an Option Agreement ("OA") dated April 11, 2003 ("Exhibit 1") under which TPL may  
10 purchase approximately 49.5 acres of the Wyckoff-Eagle Harbor Superfund Site ("Site") on  
11 Bainbridge Island, Washington (the "Property") in the years 2004-2006, or portions thereof,  
12 consistent with the OA. The Property is the former Wyckoff, a/k/a Pacific Sound Resources  
13 ("PSR"), wood treating facility, as legally described in the attached OA. TPL's goal, in accordance  
14 with the OA, is to simultaneously reconvey the Property to the extent acquired by TPL pursuant to  
15 the OA to the City for Park Use and Development Activities, as defined in Paragraph 3. The seller  
16 of the Property and the Parties herein agree that the City may join the OA as a party thereto and may  
17 directly purchase the Property or portions thereof, in accordance with the OA, without TPL.  
18 According to the Settling Respondent, TPL provides expertise in real property acquisition for public  
19 entities, including an established network for grants, fund raising and other support.

20 The Property is currently owned by PSR, formerly The Wyckoff Company. In 1994, PSR  
21 entered into a consent decree with the United States and tribal natural resource trustees pursuant to  
22 which it is required to liquidate all of its assets and transfer the proceeds into the PSR Environmental  
23 Trust ("Trust"). The PSR Environmental Trustee also serves as the Chief Executive and sole officer  
24 of PSR. Funds held by the Trust are, in accordance with the Consent Decree, dedicated for use by  
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1 EPA and certain federal and tribal natural resource trustees to remediate contaminants of concern  
2 and restore natural resources at the Site and at the Pacific Sound Resources Superfund Site in West  
3 Seattle, Washington. Pursuant to the Consent Decree, proceeds from any sale of the Property by  
4 PSR shall be disbursed solely to EPA.

5 The Property was used for treating wood and related activities from the early 1900s until  
6 1994. Particularly the subsurface of a significant portion of the Property remains highly  
7 contaminated. EPA has spent approximately \$100 million dollars toward remediating the facility,  
8 including a recently completed experimental steam cleaning remedial action pilot project, and  
9 projects very significant future remedial action expenditures. Due to the highly contaminated nature  
10 of significant portions of the subsurface of the Property, associated contaminated off-shore  
11 sediments, associated remedial outcome uncertainties, and associated uncertainties regarding  
12 prospects for future redevelopment of the Property in its suburban-Seattle island location, its fair  
13 market value has been difficult to assess. The Trust and the City jointly commissioned the most  
14 current appraisal for the Property which arrived at a total fair market value of \$8 million. This  
15 appraisal was used to set the purchase for the Property in the OA. TPL will receive a professional  
16 services fee based on the amount of the Property purchased. This fee could range from \$207,500 to  
17 \$520,000, depending on how much property is purchased and when the purchase occurs. According  
18 to Settling Respondent, this fee is intended to reimburse TPL for its staff time and other costs related  
19 to the project. If all options are exercised, approximately \$7.5 million, minus taxes and closing  
20 costs, will be available for future remedial action at either or both Wyckoff/PSR Superfund Sites as  
21 the funds are paid in 2004-2006 in accordance with the OA. The OA represents the only outstanding  
22 viable offer for the Property to date. A Prospective Purchaser Agreement from the United States is a  
23 contingency of the OA.

24 The Settling Respondent agrees to undertake all actions required by the terms and conditions  
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1 of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations  
2 and limitations contained in Sections VII, VIII, IX, and X, the potential liability of the Settling  
3 Respondent for the Existing Contamination at the Site that might otherwise result from Settling  
4 Respondent becoming the owner of the Property. The Settling Respondent's entry into this  
5 Agreement does not constitute an admission of any liability by the Settling Respondent or TPL. The  
6 resolution of this potential liability is in the public interest.

7

8

## II. DEFINITIONS

9 Unless otherwise expressly provided herein, terms used in this Agreement which are defined  
10 in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them  
11 in CERCLA or in such regulations, including any amendments thereto.

12 1. "EPA" shall mean the United States Environmental Protection Agency and any successor  
13 departments or agencies of the United States.

14 2. "Existing Contamination" shall mean:

15 a. any hazardous substances, pollutants or contaminants, present or existing on or  
16 under the Site as of the effective date of this Agreement;

17 b. any hazardous substances, pollutants or contaminants that migrated from the  
18 Property prior to the effective date of this Agreement;

19 c. any hazardous substances, pollutants or contaminants presently at the Site that  
20 migrate onto or under or from the Property after the effective date of this Agreement, unless  
21 migration is caused by, contributed to, or exacerbated by Settling Respondent; and

22 d. any hazardous substances, pollutants or contaminants at the Site originating  
23 outside the Property that have become commingled with hazardous substances, pollutants or  
24 contaminants within the scope of the foregoing subparagraphs a, b, and c of this Paragraph 2, unless

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1 such hazardous substances, pollutants or contaminants are released in whole or in part by Settling  
2 Respondent.

3 3. "Park Use and Development Activities" shall mean park use, development, construction,  
4 operation and maintenance, including but not limited to the following activities:

5 a. a war internment memorial, visitor and interpretation centers for the memorial and  
6 the former Wyckoff site, and public art or outdoor interpretation structures;

7 b. accessory park buildings, roadways, parking lots, trails and pathways, a public  
8 dock, picnic areas, and related recreational uses.

9 4. "Parties" shall mean the United States on behalf of EPA and the Settling Respondent.

10 5. "Property" shall mean that portion of the Site, encompassing approximately 49.5 acres,  
11 that is described in Exhibit 1 of this Agreement.

12 6. "Site" shall mean the Wyckoff-Eagle Harbor Superfund Site, encompassing the Property,  
13 located on Creosote Place, Bainbridge Island, Kitsap County, Washington, and all areas, including  
14 tidelands, aquatic bedlands and sediments, on or to which hazardous substances and/or pollutants or  
15 contaminants have come to be located.

16 7. "Trust" shall mean the PSR Environmental Trust.

17 8. "United States" shall mean the United States of America, its departments, agencies, and  
18 instrumentalities.

### 19 III. STATEMENT OF FACTS

20 9. PSR's approximately 49.5-acre former wood treating facility is on the southeastern  
21 shoreline of Eagle Harbor on Bainbridge Island, Washington, a municipality. The facility has been  
22 divided into various operable units for EPA administrative purposes, which are among the operable  
23 units of the Wyckoff/Eagle Harbor Superfund Site which was listed on the National Priorities List  
24 ("NPL") on July 22, 1987, at 52 Fed. Reg. 27620.

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1           10. Wood treating operations at the facility under various owners date back nearly a hundred  
2 years. The Wyckoff Company, a closely held Washington corporation, owned and operated the  
3 facility from December 1965 until operations ceased in 1994. In 1991, The Wyckoff Company  
4 changed its name to PSR, which is The Wyckoff Company's successor in every respect.

5           11. In August 1994, the United States entered a Consent Decree in the United States District  
6 Court for the Western District of Washington, Seattle Division under which the principals of PSR  
7 were released from personal liability in exchange for the transfer of all shares of PSR to the PSR  
8 Environmental Trust, an entity created by the Decree to liquidate all PSR assets for the benefit of  
9 EPA and CERCLA Natural Resource Trustees.

10           12. Contaminants of concern in groundwater and soils at the Property are chemicals from  
11 wood treatment processes, primarily creosote-derived polycyclic aromatic hydrocarbons (PAHs),  
12 pentachlorophenol (PCP), aromatic carrier oils, and dioxin/furans. It is estimated that 1 million  
13 gallons of non-aqueous phase liquids (NAPL) still remain in the subsurface of the facility.  
14 Sediments in areas of Eagle Harbor are contaminated with PAHs and other organic compounds, as  
15 well as with metals, primarily mercury. The wood treating facility is the major source of PAHs to  
16 the East Harbor through both past operating practices and contaminant transport through the  
17 subsurface. An additional source of contaminants to Eagle Harbor was created when sludge from  
18 tanks and sumps was used as fill material between an old and new bulkhead at the facility in the  
19 1950s.

20           13. The remedial action objective for the Property is the removal and treatment or disposal  
21 of subsurface contaminants to the extent practicable, or containment thereof. EPA is still evaluating  
22 a recently completed pilot study to test the applicability and effectiveness of thermal remediation  
23 (steam injection with groundwater and contaminant extraction) which helped reveal numerous  
24 technical issues which must be addressed before full scale thermal remediation could be applied at  
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1 the Site. In addition to any potentiality for full-scale thermal remediation, EPA anticipates  
2 implementation of surface capping as necessary, primarily over the Former Process Area, and  
3 containment of contaminated groundwater and NAPL with a vertical structure and extraction system,  
4 and construction of a new treatment plant for continued treatment of contaminated groundwater.

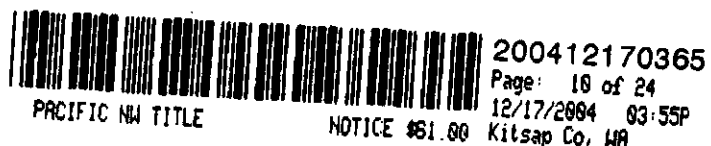
5 14. The primary remedial action objective for the East Harbor sediments is the achievement  
6 of Washington Sediment Quality Standards (SQS) and reduction of contaminants in fish and  
7 shellfish to levels protective of human health and the environment. Over 50 acres of heavily  
8 contaminated subtidal sediments in the East Harbor were capped to address adverse biological  
9 effects and free-phase oily contamination. Intertidal and upland sediments in the Former Log  
10 Storage/Peeler Area were capped or consolidated in the Former Process Area. EPA constructed a  
11 2-acre Habitat Mitigation Beach along the shoreline to mitigate for loss of intertidal areas adjacent to  
12 the Former Process Area. A sheet pile wall was constructed around the highly contaminated Former  
13 Process Area to minimize potential flow of contaminants to Eagle Harbor.

14 15. TPL is a private non-profit Internal Revenue Service Code 501(c)(3) organization, duly  
15 incorporated under the laws of the state of California. Settling Respondent City is a duly constituted  
16 municipality under the laws of the state of Washington.

17 16. Settling Respondent represents, and for the purposes of this Agreement EPA relies on  
18 such representations, that neither Settling Respondent nor TPL have had any involvement with the  
19 Property or the Site related to releases of any hazardous substances, pollutants, or contaminants, and  
20 have not caused or contributed to the release or threatened release of any hazardous substances,  
21 pollutants, or contaminants at the Site, and that Settling Respondent's and TPL's involvement with  
22 the Property has been limited to their role as prospective purchaser and purchase facilitator of the  
23 Property, respectively.

#### 24 IV. UNDERTAKINGS

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1           17. In consideration of and in exchange for the United States' Covenant Not to Sue in  
2 Section VIII herein, Settling Respondent agrees that EPA may use well water from on-site well(s) as  
3 may be required for remedial purposes without cost or charge to the United States to the extent that  
4 the City has rights, authority or control of or to such water. EPA will use reasonable efforts to avoid  
5 material impacts to surrounding users, adjacent aquifers and existing City wells located in Taylor  
6 Avenue. The City will further provide public administrative and record keeping support through  
7 provision of a Superfund document archive at City Hall, and will provide public meeting space for  
8 EPA public outreach related to the Site.

9                           V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

10           18. Commencing upon the date that it acquires title to any portion of the Property, Settling  
11 Respondent agrees to provide, and ensures that TPL will provide, to EPA, its authorized officers,  
12 employees, representatives, and any persons performing response actions under EPA oversight, an  
13 irrevocable right of access to such portion(s) at all reasonable times and to any other property to  
14 which access is required for the implementation of response actions at the Site, to the extent access  
15 to such other property is controlled by Settling Respondent, for the purposes of conducting response  
16 actions at the Site under federal law. EPA agrees to provide reasonable notice to Settling  
17 Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any  
18 provision of this Agreement, EPA retains all of its access authorities and rights, including  
19 enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended  
20 by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any  
21 other applicable statute or regulation, including any amendments thereto.

22           19. With respect to any portion of the Property acquired pursuant to the OA, the Settling  
23 Respondent shall execute and record either Exhibit 2 ("EPA Access Rights, Covenants and Use  
24 Restrictions, a/k/a 'Institutional Controls'"), or a document approved by EPA which sets forth the  
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1 institutional controls and land use restrictions and/or limitations selected to date in Exhibit 2 in the  
2 Recorder's Office of Kitsap County, State of Washington. Within 30 days of recording, the Settling  
3 Respondent shall provide EPA with a certified copy of the original recorded document showing the  
4 clerk's recording stamps. The City further acknowledges that subsequent institutional controls may  
5 be developed and selected by EPA in future Record(s) of Decision (ROD) or ROD Amendment(s),  
6 and the City agrees, in accordance with this Paragraph, to implement such institutional controls in  
7 the form of use restrictions and/or limitations which may require recording in a manner substantially  
8 similar to that set forth in this Paragraph. The City is not obligated under this Agreement to provide  
9 funds, materials, supplies or personnel for implementation or completion of any other remedial  
10 action at the Site, except as may be required in response to exacerbation of Existing Contamination  
11 or releases of contaminants consistent with the Reservation of Rights in Section IX of this  
12 Agreement. All future EPA remedial action decisions, including those selecting institutional  
13 controls the City has agreed to implement, shall be subject to the public comment and participation  
14 processes set forth in Section 117 of CERCLA and in the National Contingency Plan ("NCP") at 40  
15 C.F.R. 300.430(f)(3)-(6).

16 20. Settling Respondent shall ensure that any successor entity(ies) in interest, lessees, and  
17 sublessees of any portion of the Property that Settling Respondent acquires shall provide the same  
18 access and cooperation. Settling Respondent shall ensure that a copy of this Agreement is provided  
19 to any current lessee or sublessee on any such portion of the Property as of the effective date of this  
20 Agreement and shall ensure that any subsequent leases, subleases, assignments of or successions to  
21 any such portion of the Property or an interest in the Property are consistent with this Section and  
22 Section XI (Parties Bound/Transfer of Covenant) of the Agreement.

23 VI. DUE CARE/COOPERATION

24 21. Settling Respondent shall exercise due care at the Site with respect to the Existing  
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1 Contamination and shall comply with all applicable local, State, and federal laws and regulations. In  
2 order to minimize or eliminate potential adverse environmental consequences related to Park Use  
3 and Development Activities, the City will confer with EPA consistent with Exhibit 2. However,  
4 such conferral shall not be construed as approval or acceptance by EPA of any Park Use or  
5 Development Activities or other improvements, and any exacerbation of Existing Contamination or  
6 any releases of contaminants as a result of such activities may result in environmental liability for the  
7 City, consistent with the Reservation of Rights Section of this Agreement, as well as for any other  
8 responsible parties. The Settling Respondent further recognizes that the implementation of response  
9 actions at the Site may interfere with its use of the Property. The Settling Respondent agrees to  
10 cooperate fully with EPA in the implementation of response actions at the Site and further agrees not  
11 to interfere with such response actions. EPA agrees, consistent with its responsibilities under  
12 applicable law, to cooperate with the City and to use reasonable effort: 1) to minimize any  
13 interference with the Settling Respondent's use of the Property by such entry and response; 2) to use  
14 Creosote Place as the primary means of entry and access, except when in EPA's discretion  
15 environmental response activities may be more effectively or efficiently implemented by alternative  
16 entry and/or access; and 3) not to jeopardize, undermine or materially damage Park Use and  
17 Development Activities on the Property. In the event that Settling Respondent becomes aware of  
18 any action or occurrence that causes or threatens a release of hazardous substances, pollutants or  
19 contaminants at or from the Property that constitutes an emergency situation or may present an  
20 immediate threat to public health or welfare or the environment, Settling Respondent shall  
21 immediately take all appropriate action to prevent, abate, or minimize such release or threat of  
22 release, and shall, in addition to complying with any applicable notification requirements under  
23 Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such  
24 release or threatened release.

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VII. CERTIFICATION

22. By entering into this agreement, Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Settling Respondent and TPL and all information in the possession or control of its officers, directors, employees, contractors and agents that relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. Settling Respondent also certifies that to the best of its knowledge and belief neither it nor TPL has caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Settling Respondent is not materially accurate and complete, this Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

VIII. UNITED STATES' COVENANT NOT TO SUE

23. Subject to the Reservation of Rights in Section IX of this Agreement, the United States covenants not to sue or take any other civil or administrative action against Settling Respondent for and to the extent Settling Respondent acquires Property pursuant to the OA (or from TPL after TPL has so acquired such Property), and this Agreement for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to the Existing Contamination.

IX. RESERVATION OF RIGHTS

24. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

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- 1 (a) claims based on a failure by Settling Respondent to meet a requirement of this  
2 Agreement, including but not limited to Section IV (Undertakings), Section V (Access/Notice to  
3 Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs);  
4 (b) any liability resulting from past or future releases of hazardous substances, pollutants or  
5 contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors,  
6 assignees, lessees or sublessees or TPL;  
7 (c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees,  
8 lessees or sublessees, or TPL, of Existing Contamination;  
9 (d) any liability resulting from the release or threat of release of hazardous substances,  
10 pollutants or contaminants, at the Site after the effective date of this Agreement, not within the  
11 definition of Existing Contamination;  
12 (e) criminal liability;  
13 (f) liability for damages for injury to, destruction of, or loss of natural resources, and for the  
14 costs of any natural resource damage assessment incurred by federal agencies other than EPA; and  
15 (g) liability for violations of local, State or federal law or regulations.

16 25. With respect to any claim or cause of action asserted by the United States, the Settling  
17 Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is  
18 attributable solely to Existing Contamination.

19 26. Nothing in this Agreement is intended as a release or covenant not to sue for any claim  
20 or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity,  
21 which the United States may have against any person, firm, corporation or other entity not a party to  
22 this Agreement.

23 27. Nothing in this Agreement is intended to limit the right of EPA to undertake future  
24 response actions at the Site or to seek to compel parties other than the Settling Respondent to  
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1 perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict  
2 or limit the nature or scope of response actions which may be taken or be required by EPA in  
3 exercising its authority under federal law. Settling Respondent acknowledges it is purchasing  
4 options to purchase Property or may receive Property where response actions may be required.

5 **X. SETTLING RESPONDENT'S COVENANT NOT TO SUE**

6 28. In consideration of the United States' Covenant Not To Sue in Section VIII of this  
7 Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or  
8 causes of action against the United States, its authorized officers, employees, or representatives with  
9 respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for  
10 reimbursement from the Hazardous Substance Superfund established pursuant to the Internal  
11 Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other  
12 provision of law, any claim against the United States, including any department, agency or  
13 instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any  
14 claims arising out of response activities at the Site, including claims based on EPA's oversight of  
15 such activities or approval of plans for such activities.

16 29. The Settling Respondent reserves, and this Agreement is without prejudice to, actions  
17 against the United States based on negligent actions taken directly by the United States, not  
18 including oversight or approval of either Settling Respondent's plans or activities, that are brought  
19 pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign  
20 immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to  
21 constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. §  
22 9611, or 40 C.F.R. § 300.700(d).

23 **XI. PARTIES BOUND/TRANSFER OF COVENANT**

24 30. This Agreement shall apply to and be binding upon the United States, and shall apply to  
25

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1 and be binding upon the Settling Respondent, its officers, directors, officials, agents and employees.  
2 The United States' Covenant Not to Sue in Section VIII and Contribution Protection in Section XVIII  
3 shall apply to Settling Respondent's officers, directors, officials, agents or employees to the extent  
4 that the alleged liability of such person is based on his/her status and in his/her capacity as an officer,  
5 director, or employee of Settling Respondent, and not to the extent that the alleged liability arose  
6 independently of the alleged liability of Settling Respondent. Each signatory of a Party to this  
7 Agreement represents that he or she is fully authorized to enter into the terms and conditions of this  
8 Agreement and to legally bind such Party.

9 31. EPA hereby consents to the assignment or transfer of the rights and obligations of the  
10 Settling Respondent under this Agreement to the Bainbridge Island Park and Recreation District  
11 (BIPRD), a duly constituted municipality under the laws of the state of Washington, or to the  
12 National Park Service of the United States (NPS), or upon EPA approval in writing of such an entity,  
13 potentially to a third as yet unidentified substantially similar public entity, in connection with and for  
14 the purpose of developing or operating the Property as a park, and no further consent of EPA is  
15 required for purposes of this Paragraph. Except for a transfer to one of the entities described in this  
16 Paragraph, no rights, benefits and obligations conferred upon Settling Respondent under this  
17 Agreement shall pass to any subsequent purchaser or other grantee of the Property or any portion  
18 thereof. Such subsequent purchaser or grantee may seek an Agreement and Covenant Not to Sue  
19 from the United States, or may elect to avail itself of the provisions of the Small Business Liability  
20 Relief and Brownfields Revitalization Act of 2001.

21 32. In the event of a transfer of any portion of the Property acquired by Settling Respondent  
22 pursuant to the OA (or from TPL pursuant to the OA) to the one of the entities described in  
23 Paragraph 31 above, such entity shall continue to be bound by all the terms and conditions, and  
24 subject to all the benefits, of this Agreement except as EPA and such entity may agree otherwise and  
25

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1 modify this Agreement, in writing, accordingly.

2 33. Prior to or simultaneous with any such transfer, the BIPRD, NPS or EPA-approved third  
3 entity described in Paragraph 31 above, must consent in writing to be bound by the terms of this  
4 Agreement including but not limited to the certification requirement in Section VII of this  
5 Agreement in order for the Covenant Not to Sue in Section VIII to be available to such entity. The  
6 Covenant Not To Sue in Section VIII shall not be effective with respect to such entity if such entity  
7 fails to provide such written consent to EPA.

8 XII. DISCLAIMER

9 34. This Agreement in no way constitutes a finding by EPA as to the risks to human health  
10 and the environment which may be posed by contamination at any portion of the Property or the Site,  
11 nor constitutes any representation by EPA that any portion of the Property or the Site is fit for any  
12 particular purpose.

13 XIII. DOCUMENT RETENTION

14 35. Settling Respondent agrees to retain and, subject to any and all rights and protections that  
15 may be asserted by or afforded to Settling Respondent based on attorney-client, work product,  
16 business propriety, trademark, and/or confidentiality protections and/or privileges, to make available  
17 to EPA all business and operating records, contracts, Site studies and investigations, and other  
18 documents relating to releases or threatened releases of hazardous substances at any portion of the  
19 Property acquired pursuant to the OA for at least ten years following the effective date of this  
20 Agreement unless otherwise agreed to in writing by EPA. At the end of ten years, the Settling  
21 Respondent shall notify EPA of the location of such documents and shall provide EPA with an  
22 opportunity to copy any documents at the expense of EPA.

23 XIV. PAYMENT OF COSTS

24 36. If Settling Respondent fails to comply with the terms of this Agreement, including, but  
25



1 not limited to, the provisions of Section IV (Undertakings) of this Agreement, it shall be liable for all  
2 litigation and other enforcement costs incurred by the United States to enforce this Agreement or  
3 otherwise obtain compliance.

#### 4 XV. NOTICES AND SUBMISSIONS

5 37. All notices and submissions required under this Agreement shall be sent to the  
6 following:

7 MaryJane Nearman  
8 Remedial Project Manager  
9 United States Environmental Protection Agency  
10 Region X, M/S ECL-113  
11 1200 Sixth Avenue  
12 Seattle, Washington 98101

#### 13 XVI. EFFECTIVE DATE

14 38. The effective date of this Agreement shall be the date upon which EPA issues written  
15 notice to the Settling Respondent that the United States has fully executed this Agreement. The  
16 effective date of the rights, benefits and obligations of this Agreement for Settling Respondent shall  
17 be the date of the legal transfer of title to any portion(s) of the Property, in accordance with the OA  
18 and this Agreement, to Settling Respondent, and such benefits shall extend only to such legally  
19 transferred portion(s) upon transfer.

#### 20 XVII. TERMINATION

21 39. If Settling Respondent believes that any or all of the obligations under Section V  
22 (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the  
23 requirements of the Agreement, Settling Respondent may request in writing that EPA agree to  
24 terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in  
25 question shall continue in force unless and until Settling Respondent receives written agreement  
26 from EPA to terminate such provision(s).

#### 27 XVIII. CONTRIBUTION PROTECTION

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40. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are all response actions taken or to be taken and response costs incurred or to be incurred by the United States, the State of Washington, or any other person for the Site with respect to the Existing Contamination.

**41. Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.**

42. Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on it.

## XIX. EXHIBITS

**43. Exhibit I shall mean the Option Agreement dated April 11, 2003.**

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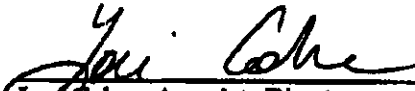
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1 44. Exhibit 2 shall mean the document entitled, EPA Access Rights, Covenants and Use  
2 Restrictions, a/k/a Institutional Controls.

3  
4 IT IS SO AGREED:

5 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
6 BY:

7  
8   
9 Lori Cohen, Associate Director  
Environmental Cleanup Office, Region X

11/1/04  
Date

10


11

12

13 IT IS SO AGREED:

14 UNITED STATES DEPARTMENT OF JUSTICE  
15 BY:

16

17   
18 Thomas L. Sansonetti  
19 Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

12.8.04  
Date

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IT IS SO AGREED:  
CITY OF BAINBRIDGE ISLAND  
BY:



Darlene Kordonowy  
Mayor  
City of Bainbridge Island



Date



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## EXHIBIT 2

### "EPA Access Rights, Covenants and Use Restrictions, a/k/a 'Institutional Controls'"

1. The above title without "a/k/a 'Institutional Controls,'" was taken from Section 6 of the Option Agreement (Exhibit 1 to the Agreement to which this document is Exhibit 2) executed by the buyer and seller in April 2003. Because the EPA model format for Prospective Purchaser Agreements comprehensively covers EPA Access Rights, such rights are not addressed in this document. Similarly, since there are no outstanding Covenants to consider, and Use Restrictions are generally subsumed under the broader category of EPA remedial action known as Institutional Controls, the "a/k/a" was added to the title of this Exhibit by the Parties to the Agreement who agree that this document, with the text of the Agreement, meets the intent of the parties to Exhibit 1 in their reference to this document in Section 6 of Exhibit 1.

2. In accordance with Paragraph 19 of the Agreement, EPA identified Institutional Controls in the form of use restrictions and/or limitations in the *East Harbor Operable Unit Wyckoff/Eagle Harbor Superfund Site Record of Decision*, (Section 10.2.3) dated September 1994 (EH ROD), and in the *Wyckoff/Eagle Harbor Superfund Site Soil and Groundwater Operable Units Bainbridge Island, Washington Record of Decision* (Declaration, Section 9.1, and Section 12.1), dated February 2000 (S&G ROD). In addition:

a. The no-anchor zone established in accordance with the EH ROD is physically larger than the existing area of sediment capping. EPA will upon request supply the United States Coast Guard (USCG) with precise information regarding the extent of existing capping to assist the USCG in considering a request by Settling Respondent for a waiver in a portion of the no anchor zone consistent with the no anchor zone listing in the Federal Register. EPA has no current plans for or projection of future sediment capping within the no anchor zone, however future capping and other remedial action, within the no anchor zone and beyond it, related to environmental conditions at the Site cannot be ruled out at this time.)

b. In accordance with the S&G ROD, EPA excavated contaminated soil from the Former Log Storage/Peeler Area to meet the substantive requirements of MTCA Method B. This remedial action has been completed and confirmation soil sampling, as documented in the Soil Removal Report Former Log Storage/Peeler Area dated February 28, 2003, indicates that the soils in this area meet this standard; therefore, no additional land use restrictions are anticipated at this time for the protection of human health or the environment.

c. Pursuant to the S&G ROD, EPA created and/or restored approximately 1500 linear feet of shoreline and approximately 1.5 acres of intertidal habitat, including a coastal vegetated buffer. The vegetated buffer was constructed to: (1) provide separation between functioning intertidal habitat and upland human activity; (2) moderate the impacts of stormwater runoff by stabilizing soils, providing erosion control and filtering suspended solids; and (3) provide essential habitat for fish and upland shoreline wildlife for use in feeding, breeding, rearing, and cover from predators. Any activities by the Settling Respondent shall be consistent with maintenance of the created and/or restored shoreline and vegetated buffer.



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d. For development setback requirements along the habitat mitigation beach, the Settling Respondent shall use the standards for recreational development in the Conservancy Shoreline Environment as specified in the Bainbridge Island Shoreline Master Program (Bainbridge Island Municipal Code 16.12.150 Table 4-2 or its successor) and the Shoreline Management Act [see RCW 90.58 or its successor and WAC 173-22].

3. Settling Respondent shall not alter, modify, or remove any existing structures or caps implemented or installed as environmental response action, or such structures or caps which may come to exist as a result of future remedial action at the Site, in any manner that may damage or adversely affect the integrity or function of any structure or cap.

4. Consistent with Paragraph 21 of the Agreement, the Settling Respondent may share plans with EPA with regard to its projected Park Use and Development Activities, such as a projected Soil Management/Construction Contingency Plan, and seek such informal advice or assistance as EPA may be able to provide.

5. With the exception of withdrawals from the existing on-site water supply well, Well 01-CT01, and unless otherwise agreed to by EPA, Settling Respondent shall not install wells nor withdraw, nor allow third parties to withdraw, groundwater from the Property.

6. Settling Respondent must obtain written approval from EPA prior to any proposed use of the Property that is inconsistent with this Exhibit or the Agreement. As set forth in the Agreement, subsequent institutional controls may be developed and selected by EPA in future Record(s) of Decision or ROD Amendment(s), and the City agreed in Paragraph 19 of the Agreement to implement such institutional controls in the form of use restrictions and/or limitations which may require recording in a manner substantially similar to that set forth in Paragraph 19. This Exhibit may be modified or amended by the Parties to further clarify Settling Respondent's limitations, obligations or responsibilities.



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